



POLICE DEPARTMENT

March 10, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Ohmeed Davodian
Tax Registry No. 926740
34 Precinct
Disciplinary Case No. 83805/08

The above-named member of the Department appeared before me on September 26, 2008, and November 21, 2008, charged with the following:

1. Said Police Officer Ohmeed Davodian, assigned to the 34 Precinct, while on-duty, at about 1800 hours, on September 27, 2006 at 608 West 191 Street, New York County, did abuse his authority as a member of the New York City Police Department in that he searched an individual known to this Department without having the legal authority to do so: to wit, Respondent removed money, two cell phones, and keys from said individual's pants pockets.

P.G. 203-10, Page 1, Paragraph 4 – ABUSE OF AUTHORITY

2. Said Police Officer Ohmeed Davodian, assigned to the 34 Precinct, while on-duty, at the date, time and location in Specification #1, did abuse his authority as a member of the New York City Police Department in that he searched the car of an individual known to this Department without having the legal authority to do so.

P.G. 203-09, Page 1, Paragraph 2 – ABUSE OF AUTHORITY

3. Said Police Officer Ohmeed Davodian, assigned to the 34 Precinct, while on-duty, at the date, time and location in Specification #1, did use excessive force against an individual known to this Department: to wit, Respondent slapped said individual across the face.

P.G. 203-11, Page 1, Paragraph 2 – FORCE

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The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and the Respondent was represented by John P. Tynan, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of Specification No. 2 and Not Guilty of Specification Nos. 1 and 3.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Joel Guzman as a witness and offered the statements of Michelle Nicasio and John Santana.

Joel Guzman

Joel Guzman, who is 21 years old, testified that he is presently incarcerated at Washington Correctional facility, a medium security institution, where he is serving a five year sentence for multiple convictions. He was arrested in Suffolk County in June, 2007, for selling 70 grams of cocaine. He pleaded guilty to one count of Criminal Possession of a Controlled Substance (CPCS) in the second degree. After he pleaded guilty in Suffolk County, he entered a plea of guilty to a CPCS charge in Nassau County for selling 3 grams of cocaine there. He was previously convicted of CPCS as a

misdemeanor for possessing marijuana and he has also pleaded guilty to a charge of Assault in the third degree. For the Assault conviction, he received a one year sentence that he is presently serving concurrently with his five year sentence.

He recalled that on the afternoon of September 27, 2006, he drove his car to 608 West 191st Street, Manhattan, where he once resided, to see his cousin John Santana and a friend named Victor. He testified that he often hung out in front of 608 West 191st Street and that although drug sellers operated on that block of West 191st Street, he did not see anyone selling drugs there that day. Guzman testified that he was not personally selling drugs there or anywhere else during September, 2006, because he was taking college courses then.

He parked his car across the street from 608 West 191st Street. A girl named Kathy offered to braid his hair and so he sat down in front of 608 West 191st Street to have his hair braided. The girl had only finished braiding one side of his head when a car pulled up. Police officers got out of the car and demanded that everyone in front of 608 West 191st Street turn around and face the wall and place their hands on the wall. They were all then frisked. The officer who frisked him removed his car keys, \$400 in cash and two cell phones that he had on him. He explained that one of the phones was his mother's cell phone and that he was carrying it because his own cell phone was not working.

Guzman testified that the Respondent, who either frisked him himself or got his car keys from the officer who had patted him down, used the keys to open his car and that the Respondent then searched the car. Guzman testified that when the Respondent started to search his car, he yelled out twice, "Why are you searching my car?" The Respondent

told him to shut up. The Respondent then walked back across the street and, without saying anything to him, slapped him across the face. When he protested this slap, the Respondent told him to shut up and then slapped him in the face again.

Guzman was arrested for disorderly conduct. When he appeared in Criminal Court, he pleaded guilty to disorderly conduct and received a sentence of time served. Guzman filed a complaint with the Civilian Complaint Review Board (CCRB). Guzman learned the Respondent's name because he signed the voucher listing the property that had been removed from Guzman.

On cross-examination, Guzman admitted that he sold drugs during April and May, 2006, and that he had resumed selling drugs when he was arrested in June, 2007. He admitted that at the time he was arrested he possessed "a kilo" of phony cocaine that looked like cocaine and that he used to scam the people he sold it to. He asserted that he has never personally consumed cocaine, "only grass." Guzman testified that he asked the other officers who were present in front of 608 West 191st Street, "Are you going to let him fucking do this?"

Michelle Nicasio

At an interview conducted at CCRB on October 26, 2006, Michelle Nicasio stated that on September 27, 2006, at about 6:00 p.m., she was standing on the corner of Wadsworth and West 191st Street, Manhattan. In front of the building at 608 191st Street, she saw her cousin John Santana and Joel Guzman with another person. She recalled that "Joel was getting his hair braided" when "the cops came and just threw them against the wall, all three of them, and searched all of them. He found Joel's keys, his car keys in his

pocket and asked him where his car is at...His car was parked on the other side of the street. He went to his car and Joel said, 'Why are you going to search my car?' and he was like 'Shut up' and smacked him against the face. So he thought that Joel was going to hit him back so he searched Joel quickly and just put him there and searched his car."

When Nicasio was asked who had searched the car, she answered, "The undercover, one of them. One searched him and one searched his car." The undercover who searched his car "took the keys. That's when Joel said, 'Why are you taking my keys? Why are you searching my car?' and he was like 'Oh shut up,' and then he thought Joel was going to hit him so he smacked him... He hit him twice." Nicasio was asked, "Before the officer slapped him what was Joel doing?" She answered, "He was standing there; that's when he told the cop – because the officer asked him, 'Where is your car?' and he said 'Across the street,' he said 'I'm going to go search it.'" Nicasio recalled that Guzman told the officer, "You're not going to find anything inside my car." The officer then said "Shut up" and smacked him because "Joel was trying to get smart with him..."

Nicasio recalled that, "Joel never gave him permission to search his car," that only one officer searched the car and that he "just opened the door and closed it right back...I don't think they got to search the car...I don't think they really searched it because they just closed it right away just to mess with him...I don't remember if they opened the trunk."

Nicasio was then asked, "So what happened after they looked in his car?" She answered, "They just locked the door, walked back and just took Joel and put him in the car." Nicasio was asked, "Where is Joel while they were searching his car?" She answered, "Across the street. They had him handcuffed."

John Santana

At an interview conducted at CCRB, John Santana stated that on September 27, 2006, at about 6:00 p.m., he was in the vicinity of 608 191st Street, Manhattan. He was there “hanging out with my friends,” his cousin Joel Guzman and a girl who “was braiding my cousin’s hair...so we sat in front of 608...we were sitting there for no longer than like ten, fifteen minutes...and the cops came and told us, ‘Okay, everybody get on the wall.’ He put us on the wall and searched all of us and searched the building. He takes my keys, asked me if I live there and I was like ‘No, no officer.’ He asked the girl if she lives here. Then they asked my cousin Joel if he lives there. We all said, ‘No.’ Then he searched. He took all our keys and then he asked Joel if it was the alarm to his car.”

Santana recalled that when this officer asked Guzman, “Do you have a car?” Guzman replied, “My car is across the street.” Santana recalled that, “The officer went across the street, opened the car, started searching and Joel started screaming at him ‘What the fuck are you doing in my car?’ He was mad. He was saying he knew his rights and he shouldn’t be looking in his car without a warrant or anything.” Santana recalled that the officer who had walked across the street and searched Guzman’s car came back across the street “and slaps Joel – slaps him – boom. After he slaps him, Joel says, ‘Don’t put your hand,’ and they’re looking at him like they don’t understand what he’s saying and while he’s saying the officer slapped him again. He told the two officers in uniform to handcuff him so they handcuffed him and basically told me ‘Just get out of here,’ and gave me back my house keys.”

Santana stated that the officer who searched Guzman's car "made a mess of the car...he just threw everything on the floor...opened the glove compartment and threw all that on the floor. He popped the trunk and started pushing things out the way in the trunk, checked the back seat and just started throwing things on the floor."

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent testified that on September 27, 2006, he performed a tour of duty of 1130 hours to 2005 hours with Police Officer Eric Rodriguez and Sergeant Joseph Kourakos. They were assigned to the 34 Precinct's Community Policing Unit which was tasked, in part, with enforcing drug-related offenses. He testified that he had previously made a number of arrests in the vicinity of 608 West 191st Street, an apartment building.

He recalled that at about 1800 hours, as they were driving by 608 West 191st Street, he observed males sitting in front of the entrance doorway "blocking the free flow of pedestrian traffic." They approached these individuals and asked, "Do any of you live here?" They all responded in the negative. He ordered them to stand up and to stand against the wall. The officers then patted down their clothing "for our safety." He could not recall "who patted down who." He did not search anyone's pockets. He recalled that "a pair of keys surfaced." He decided to check to see if any of these keys fit the lock on the front door to the building because he wanted to see if drugs were being stored in the vestibule. He gained access to the vestibule and observed drug paraphernalia, "blunt

wrappings” and one inch by one inch plastic zip lock baggies, on the ground. He noticed a car alarm attached to the keys. Guzman told him that the alarm was for his car and that it was parked across the street. He walked over to Guzman’s car and conducted a visual inspection of exterior portion of the car including the gas tank and the wheel wells because he knew that drug dealers often hide drugs in these areas of their vehicles so that they can readily access their supply. He found nothing in these exterior areas. He then peered into the car’s windows. He observed the handle of “an object which I believed to be a weapon” on the floor board of the passenger side. He became “concerned that it possibly could be...an extended handle on a gun or something like that” because the handle “appeared to be taped up.” He used Guzman’s keys to unlock the passenger door. He opened the door and reached inside the car to examine the object. He determined that the object was not a weapon.

Guzman began yelling at him from across the street. He twice ordered Guzman to stop yelling at him and when he refused to stop he decided to arrest him for disorderly conduct. He walked back across the street and ordered Guzman to put his hands behind his back and turn around. Guzman refused to comply and when he “went for” Guzman’s shoulders with his hands in order to physically turn him around and handcuff him, his hand “missed” Guzman’s shoulder and his open hand accidentally made contact with Guzman’s chin. He vouchered \$400 in cash, the car keys and two cell phones.

On cross-examination, he was confronted with the fact that he had not mentioned during his CCRB interview that he had observed “blunt wrappings” and one inch by one inch plastic zip lock baggies on the ground. He testified that he could not recall whether

he had mentioned these items but that if he had not mentioned them it was because he was never asked about them.

He testified that during the pat downs he did not search Guzman's pockets. He conceded that at his CCRB interview he had stated that he could not recall whether or not he had searched Guzman's pockets.

The Respondent acknowledged that after he took possession of Guzman's keys, he "figured out" which car parked across the street was Guzman's car by pressing the car alarm button on Guzman's car keys. He agreed that the object he observed through the window of the car appeared to be a piece of wood. When he was asked if he believed that this object was a gun, he responded, "I didn't know what it was. It appeared to be a weapon made out of wood." The Respondent acknowledged that when he peered through the car window he did not see any drugs inside the car and that at the time he approached the car he possessed no information that Guzman had drugs inside his car or that he had a weapon inside his car.

The Respondent testified that Guzman was so angry at him that he became "fearful" that Guzman might try to use force against him. When he was confronted with the Patrol Guide section regarding when a police officer is authorized to use force, the Respondent testified that he had been trained that police officers are permitted "to use one level of force higher than is being used against us." He further testified that he had been trained that "open hand control" is allowed to gain control of an unruly suspect. The Respondent testified that although his hand "struck" Guzman's chin, he did not slap Guzman in the face. He handcuffed Guzman by himself because the officers who were with him were busy dealing with the other individuals at the scene.

FINDINGS AND ANALYSIS

Specification No. 1

It is charged that the Respondent abused his authority by searching Guzman's person and removing two cell phones, keys and money from his pants pockets without having the legal authority to do so.

The Department did not dispute the Respondent's testimony that he was familiar with the vicinity of 608 West 191st Street because he had made a number of arrests in that area prior to September 27, 2006. It is also undisputed that when the Respondent approached the front of 608 West 191st Street, Guzman, who did not live there, was hanging out in front of the building with other people who did not live in that building. The Assistant Department Advocate (ADA) further acknowledged that the evidence presented at this trial established that when the Respondent initially approached Guzman and the others, the Respondent's intent was to investigate why they were blocking the entrance to the building.

Although the ADA conceded that the Respondent may well have had the right to conduct a safety frisk of Guzman to ascertain if he was carrying any weapons, the ADA asserted that the Respondent should be disciplined for removing keys and cell phones from his pockets. I disagree. Guzman admitted that his pockets contained two cell phones and his car keys. When the Respondent patted down the outside of Guzman's clothing,¹ he would have felt these three items as hard objects. I do not subscribe to the ADA's position that an object that feels like a cell phone or a key when it is touched through clothing during a pat down must be left alone and that the Respondent should be

¹ Although the Respondent testified that he could not recall "who patted down who," he acknowledged that he came into possession of Guzman's car keys. For the purposes of this analysis, I will assume that the Respondent conducted the pat down of Guzman.

disciplined for reaching into Guzman's pockets and removing these objects for inspection.

The problem facing a police officer conducting a pat down frisk is that dangerous weapons can be disguised as innocent objects. This Department has frequently issued bulletins alerting members that searches of suspects have resulted in the discovery of weapons disguised as everyday objects. Of particular relevance to the facts presented here, the Federal Bureau of Investigation (FBI) has issued an alert to police departments regarding a weapon that "appears to be a key, but it actually is similar to a box cutter and can serve as a knife." The FBI cautioned that "law enforcement officers should be aware of the possible threat of this object."² Also, a recent appellate decision involved a search of a suspect that was performed, as is the case here, by a police officer on a Manhattan street which resulted in the discovery of a switchblade knife that was disguised as a cigarette lighter.³

Based on the above, I find that removing the keys and the two cell phones from Guzman's person is not an action that rises to the level of actionable misconduct for which discipline should be imposed. I make this finding notwithstanding that if Guzman's keys had actually turned out to be a disguised knife, a trial judge or an appellate court may well have suppressed the knife as evidence. As Court of Appeals Judge Joseph Bellacosa noted in his dissent in Torres, "(D)angers" that lurk in "the hard

² FBI Law Enforcement Bulletin, Vol. 73, No. 9 (Sept. 2004), p. 13.

³ People v. Wood, 869 NYS2d 401 (1st Dept. 2008).

streets” may seem to be “far-fetched to Judges in the protected enclave of the courthouse, but not to cops on the beat.”⁴

The Respondent is found Not Guilty of Specification No. 1.

Specification No. 2

It is charged that the Respondent abused his authority by searching Guzman’s car without having the legal authority to do so.

I find the Respondent Guilty based solely on his own testimony.

It is undisputed that the Respondent’s interaction with Guzman took place at the entrance to 608 West 191st Street, that Guzman’s car was parked across the street and that the car’s doors were locked. The Respondent discovered nothing on Guzman’s person which would provide him with reasonable suspicion to believe that Guzman had secreted a weapon or contraband inside his car and the Respondent acknowledged that at the time he approached Guzman’s car he possessed no information that Guzman had a gun or other weapon inside his car. The Respondent testified that he walked over to Guzman’s car to conduct a visual inspection of the gas tank and wheel wells because he knew from experience that street dealers hide drugs in these areas of their vehicles so that they have ready access to their supply. When these exterior inspections produced negative results, the Respondent then used Guzman’s keys to unlock the passenger door. He opened the door and reached inside the car.

Although the Respondent had the right to examine Guzman’s keys to insure that the keys were not a disguised weapon, without more the Respondent had no right to use

⁴ People v. Torres, 544 NYS2d 796 (1989).

the keys to open the door of Guzman's car. The Respondent asserted that the sole reason he unlocked the car door, opened it and reached inside the car was because when he looked into the interior through the car's window, he observed what appeared to be the handle of "an object which I believed to be a weapon" on the floor of the car. On direct examination he asserted that he genuinely believed that this object "possibly could be...an extended handle on a gun or something like that" because the handle "appeared to be taped up." However, on cross-examination he conceded that the object appeared to be a piece of wood and that he actually "didn't know what it was." He nonetheless claimed that it "appeared to be a weapon made out of wood."

Based on his testimony, I reject the Respondent's claim that he genuinely believed that this piece of wood might be an extended handle on a gun. Moreover, even if I credited the Respondent's claim that he genuinely believed that the piece of wood might be a weapon, the object was not within Guzman's reach since he was being detained across the street.

To enter and search an unoccupied vehicle an officer must have probable cause that the vehicle contains a weapon, evidence of a crime or a means of escape. Reasonable suspicion alone is not sufficient. Here, the Respondent did not even possess reasonable suspicion that Guzman's car contained a weapon, evidence of a crime or a means of escape. Moreover, the Respondent's search cannot be justified under the automobile exception, because an officer may only conduct a warrantless search of an automobile if the officer has probable cause to believe that the vehicle contains evidence or contraband and there is a nexus between the probable cause to search and the crime for which the

arrest is being made.⁵ Here Guzman was arrested for engaging in disorderly conduct while he was across the street from his car. Thus, there was no nexus between the Respondent's search of the car and the crime for which Guzman was arrested.

The Respondent is found Guilty of Specification No. 2.

Specification No. 3

It is charged that the Respondent used excessive force against Guzman in that he slapped him across the face.

Guzman testified that the Respondent intentionally slapped his face twice because he protested when the Respondent searched his car. The Respondent admitted that his hand had struck Guzman's chin. However, the Respondent asserted that his hand accidentally came into contact with Guzman's chin when he missed as he tried to grab Guzman's shoulders in order to turn him around.

Thus, the issue presented is whether the evidence presented by the Department sufficiently establishes that the Respondent intentionally slapped Guzman. I find that it does not.

Guzman's credibility must be examined in light of his criminal record, his admission that he had "scammed" drug customers, and his claim that he was not selling drugs at the time this incident took place. Guzman asserted that he was not selling drugs in September, 2006. The believability of his assertion must be questioned in light of his admissions that he often hung out in front of 608 West 191st Street even though he did not live there and that drug sellers often operated on that block of West 191st Street, and

⁵ Legal Bureau Bulletin, Vol. 24, No. 4 (July 1994) p. 3.

in light of the fact that he had two cell phones on him. His explanation as to why he was carrying his “mother’s cell phone” as well as his own was not convincing.

Moreover, Guzman admitted that he sold drugs in April and May, 2006, and that he had resumed selling drugs at the time of his arrest in June, 2007. Combined with his admission that he had previously sold marijuana, it is difficult to credit his assertion that he was not selling any drugs at all during September, 2006.

Finally, in evaluating Guzman’s character and his willingness to lie, I find it significant that he admitted that he was willing to scam people he sold cocaine to by selling them white powder that looked like cocaine.

The only evidence offered by the Department to support Guzman’s claim that the Respondent slapped him across the face was the statements Nicasio and Santana made at CCRB which were offered as hearsay evidence at this trial. The believability of their statements is open to question because they are related to each other. Also, since Nicasio and Sanatana did not appear at this trial, Respondent’s counsel was denied the opportunity to question them regarding whether Guzman coached them as to what to say before they were interviewed by CCRB. Also, their failure to testify made it impossible to observe their testimonial demeanor or to assess their accounts after they had been subjected to cross-examination.

Based on the above, I find that Guzman’s testimony and the hearsay statements of Nicasio and Sanatana do not constitute sufficiently credible evidence to support a guilty finding.

The Respondent is found Not Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

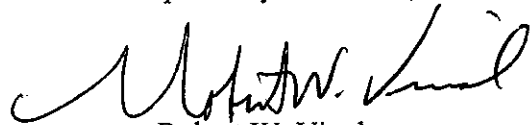
The Respondent was appointed to the Department on September 29, 2000. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

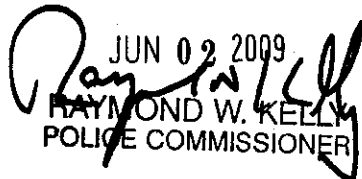
The Respondent has been found Guilty of abusing his authority by searching a suspect's car without sufficient legal basis to do so. In formulating a penalty recommendation, I have taken into consideration the fact the Respondent's two previous formal disciplinary cases both involved off duty incidents. Thus, this is the first occasion on which he has been served with Charges & Specifications for on duty misconduct.

In Disciplinary Case No. 81682/06 et al. (decision issued by the Police Commissioner on November 19, 2007), a ten-year member who had no prior disciplinary record was found Guilty of having searched a vehicle without sufficient cause. The Police Commissioner disapproved the trial commissioner's penalty recommendation that Respondent be required to forfeit five vacation days. Instead, the Police Commissioner directed that the member be offered the opportunity to sign a Schedule A Command Discipline under which he would forfeit two vacation days.

It is recommended that the Respondent be required to forfeit two vacation days.

Respectfully submitted,


Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED

JUN 02 2009
RAYMOND W. KELLY
POLICE COMMISSIONER